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OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking to Consider Regulating Telecommunications Services Used by Incarcerated People.	Rulemaking 20-10-002 (Filed October 8, 2020)

OPPOSITION OF THE UTILITY REFORM NETWORK, CENTER FOR ACCESSIBLE TECHNOLOGY, AND PRISON POLICY INITIATIVE, INC. TO THE APPLICATIONS FOR REHEARING OF DECISION 21-08-037

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I. INTRODUCTION

Pursuant to Rule 16.1(d) of the Commission's Rules of Practice and Procedure, The Utility Reform Network, Center for Accessible Technology, and Prison Policy Initiative, Inc. (collectively the "Joint Consumers") file this opposition to the Applications for Rehearing filed by Securus Technologies, LLC ("Securus")[1] and NCIC Inmate Communications[2] ("NCIC," and collectively with Securus, the "Applicants").

The Applicants seek rehearing of the Commission's Decision Adopting Interim Rate Relief for Incarcerated Person's Calling Services (Decision 21-08-037, the "Interim Decision," issued on August 23, 2021). Because the Interim Decision relies heavily on the Commission's analysis of the market for incarcerated persons' calling services ("IPCS"), we begin our discussion with a review of that analysis, noting its firm support in the record. We then address the Applicants' specific arguments regarding rates, procedure, ancillary fees, site commissions, and impairment of contracts. In sum, the Commission has set forth a cohesive and fact-based decision, and the Applicants have not satisfied the burden that applies to parties seeking rehearing under Rule 16. The Applications should be denied.

[1] Securus Technologies, LLC Application for Rehearing of Decision D.21-08-037 (Sep. 22, 2021) ("Securus Application").

[2] Network Communications International Corporation D/B/A NCIC Inmate Communications Application for Rehearing (Sep. 21, 2021) ("NCIC Application").

II. MARKET POWER

A. The Commission's Market Analysis is Supported by Substantial Evidence in Light of the Whole Record.

The Interim Decision finds that the IPCS market more accurately consists of two separate markets: the market for the right to provide exclusive IPCS to a facility (the "bidding" market), and the market for IPCS services purchased by incarcerated persons and their families (the "consumer" market).[3] While Securus argues that the Interim Decision errs in its evaluation of IPCS providers' market power,[4] Securus's Application does not dispute the Interim Decision's conclusion that there are two relevant markets. Yet, Securus argues that the Commission "ignores" the bidding market and fails to address evidence of competition in that market. The Joint Consumers urge the Commission to uphold its prior conclusion that the market for IPCS is not competitive and that its determination that this lack of competition creates unjust and unreasonable rates is supported by substantial evidence; Joint Consumers further urge the Commission to make clear that it was not required to determine the competitiveness of the bidding market in reaching its conclusions.

1. The Commission's Determination that the Market for IPCS is not Competitive and is Causing Unjust and Unreasonable Rates is Supported by Substantial Evidence in Light of the Whole Record.

a) The Commission Properly Determined the Relevant Consumer Market.

Securus erroneously argues that the Interim Decision does not define the consumer market, and that the Commission's failure to do so makes it impossible to determine whether

[3] Interim Decision at 34, 37 and 104-105 (Findings of Fact 17 and 18).

[4] Securus Application at p. 33.

IPCS providers have market power.[5] When examining the state of competition for a particular product, the Federal Trade Commission and United States Department of Justice define the relevant market for the product.[6] A relevant market consists of all goods which are "reasonably interchangeable" with a product.[7] A market where there are no reasonable interchangeable substitutes for a product is considered a monopoly market.[8] The Interim Decision appropriately concludes that the consumer services market for IPCS is a monopoly market, and that IPCS providers exercise market power in that market.[9] The Interim Decision correctly defines one of the product markets as the market for IPCS purchased by incarcerated persons and their families,[10] and correctly notes that "incarcerated people are a captive customer class who have no choice in service provider."[11] Accordingly, Securus's claim that the Commission did not define a relevant market is incorrect.

b) The Commission Properly Determined that IPCS Providers Have the Ability to Unilaterally Raise or Alter Prices in the Consumer Market.

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[5] Securus Application at p. 36.

[6] U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, p. 7 (August 19, 2010), available at http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf (hereafter, Merger Guidelines).

[7] *United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 395 (U.S. 1956).

[8] *See* United States Department of Justice, Competition and Monopoly, Single-Firm Conduct Under Section 2 of the Sherman Act: Chapter 2 (2008), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2008/09/12/236681_chapter2.pdf (last accessed April 30, 2021).

[9] Interim Decision at 34. More accurately, because each facility "typically [limits] provision of IPCS within a facility to one provider," each facility constitutes a separate geographic market.

[10] Interim Decision at 34, 37, and 104-105 (Findings 17 and 18). The second market the Commission defined, the bidding market, is discussed below.

[11] Interim Decision at 34.

Securus incorrectly claims that there was not sufficient evidence to determine whether IPCS providers exercise market power in the consumer market. As Securus acknowledges, a company has market power when it can charge prices higher than it would be able to charge in a competitive market.[12] This is even true where a company is not a monopoly. In highly concentrated markets, firms can control prices "by recognizing their shared economic interests and their interdependence with respect to price and output decisions.[13] Securus argues that IPCS providers do not have market power because they do not have the ability to unilaterally "raise or alter [phone rates] set through the competitive bidding process"[14] and therefore providers lack the ability to "sustain prices at levels above those a competitive market would produce."[15] However, this tortured interpretation of competition law ignores the fact that IPCS providers have the ability to raise or alter prices when *creating* a bid. To be clear, while carceral facilities may choose which services, technology, equipment, and site commissions to include in a request for a bid, IPCS providers ultimately set the price for each component of the bid.[16] This includes phone rates, which are then passed along to incarcerated persons, who are the end customers.

The Interim Decision notes that "[n]either Staff nor any party identified an instance in California where an incarcerated person has a choice of IPCS provider."[17] There is ample evidence in the record that there are no available substitute IPCS providers for incarcerated

[12] Securus Opening Comments at 5.

[13] Brooke Group v. Brown & Williamson Tobacco Co., 509 U.S. 209, 227 (1993).

[14] Securus Application at 36.

[15] Securus Application at 36 (citing Interim Decision at 39).

[16] In its reply comments on the PD, CforAT noted that "GTL and Securus' argument that carceral facilities set prices because they select customized packages of services and ultimately determine which bid to accept is ludicrous. This is akin to arguing that because a person that goes to a restaurant gets to pick items from a menu and ultimately decide what to order, restaurant customers determine restaurant pricing." CforAT Reply Comments on PD at 2.

[17] Interim Decision at 31.

persons.[18] Accordingly, it was reasonable for the Commission to conclude that IPCS providers have the ability to charge prices higher than they would charge in a competitive market.

2. The Commission Was Not Required to Determine the Level of Competition in the Bidding Market in Order to Determine that Rates were Unjust and Unreasonable.

In the face of the demonstrated lack of competition in the consumer market, the Securus Application attempts to turn the focus to the bidding market, i.e. the "market where providers compete for contracts in response to correctional authorities' RFPs,"[19] arguing that the bidding market is the "relevant market" and the Commission failed to analyze the level of competition in this market.[20] As discussed above, the Commission properly determined that IPCS providers have market power in the consumer market, through which incarcerated persons, their families, and their support networks purchase IPCS services with no choice of service provider; it further correctly determined that this market power creates unjust and unreasonable rates. Even other carriers like Verizon and NCIC note the "indicators of potential market power abuse" in the IPCS market through the high cost of service, exclusive serving agreements with facilities, and fees for billing and payments.[21] The determinations in the Interim Decision, including the finding that IPCS providers are charging incarcerated persons unjust and unreasonable rates, was appropriately reached independently of an analysis of the bidding market through undisputed analysis of rate comparisons, showings of a lack of provider choice for end users and the existence of captive customers and cross subsidy of site commissions. Accordingly, the fact that

[18] Interim Decision at 19 (citing CforAT Comments on Staff Proposal at 3).

[19] Securus Application at 33-34 (citations omitted).

[20] Securus Application at 32.

[21] Interim Decision at p. 29 (citing Verizon Comments on Staff Proposal at 3); NCIC Opening Comments on Staff Proposal at 3-4.

the Commission put off its analysis of the bidding market until the next stage of this proceeding[22] in no way undercuts its analysis of the consumer market and its findings regarding that market.

Securus additionally argues that to the extent the Commission did consider the bidding market, the Commission improperly (1) concluded that carceral facilities may award RFPs to the highest bidder, (2) failed to consider statements by the providers that they compete "vigorously" in the bidding market, and (3) improperly concluded that the decline in rates over time was evidence that the bidding market was competitive.[23] As discussed above, the Commission expresses its intent to "further examine" the bidding market in Phase II of this proceeding,[24] but finds that the RFP process and site commission structure preliminarily demonstrate market power that must be addressed quickly. Accordingly, Securus' claims that the Commission failed to properly analyze the bidding market is premature. Securus does not acknowledge that the adopted rate caps are interim and that IPCS providers will be given an opportunity to provide additional information into the record during Phase II to address this issue before any decision is reached with regard to permanent rates. Nothing in the Application demonstrates error in the Commission's Interim Decision.

[22] Interim Decision at 37.

[23] Securus Application at 34.

[24] Interim Decision at p. 37.

III. THE INTERIM RELIEF RATE IS JUSTIFIED IN THE RECORD

A. The Commission record sufficiently supports the interim relief rate of $0.07 per minute for voice communications

1. The adopted interim rate is justified based on the evidence in this proceeding's record.

Applicants' arguments that the interim rate adopted in the Interim Decision is not justified[25] ignore the substantial record evidence of rates charged by IPCS service providers in California,[26] and comparisons with rates charged in other states' facilities.[27] This includes information on the record provided by IPCS service providers, including Securus.[28] The record also includes substantial material compiled by the Commission's Communications Division

[25] Securus Application at 10-23; NCIC Application at 5-7.

[26] *See* Cal Advocates Opening Comments to OIR at 3-4; Prison Policy Initiative Opening Comments to OIR at 5-6, and Exhibit 1 and 2 (presenting rate information obtained through service providers' publicly available information for several types of correctional facility systems or single-facilities); Root and Rebound Opening Comments to OIR at 8 (presenting jails and juvenile facilities information); NCIC Opening Comments to OIR at 4-5 (describing rate changes NCIC made in newly acquired contracts in California); Prehearing Conference December 10, 2020 Transcript at 71:24-28 to 72:1-16 (NCIC, Mr. Pope) ; TURN Reply Comments to OIR at 5; Cal Advocates Opening Comments to Staff Proposal at 3 and note 17 (presenting analysis based on data request responses of four of California's largest ICS providers).

[27] Prehearing Conference December 10, 2020 Transcript at 53:7-20 (NCIC, Mr. Pope)(explaining that other states have done rate caps, such as "Alabama, Georgia, North Carolina, Massachusetts, Ohio"), and at 70:22-25 (NCIC, Mr. Pope)(stating that NCIC has worked "probably in about eight different states now to help cap [telephone] rates to get them to a reasonable level"). In addition, as part of its analysis of the Staff Proposal, Cal Advocates identified that in at least 14 states have a prison voice-calling rate at or below 5 cents per minute. Cal Advocates Opening Comments to Staff Proposal at 9-10, and Table 2 (explaining that for 84 percent of the states, their intrastate rate was already lower that the 21-cent rate in the Staff Proposal); Cal Advocates Opening Comments to Staff Proposal at 6 (presenting expert analysis that fourteen states have caps on intrastate phone rates in prisons that are at or below five cents per minute). Securus argues that the comparison to other states' facilities is not appropriate, but the references are a comparison of rates that IPCS providers have agreed to use in contracts in other states. Securus Application at 21-22. The Interim Decision states that the providers should be "up to the challenge of matching or beating" the 5-cent rate average "achieved in other states' prison systems." Interim Decision at 52.

[28] Prehearing Conference December 10, 2020 Transcript at 15:4-11 (Securus, Ms. Acocella) (stating in 2020, "more than 50 percent of all calls on our network costs consumers less than a dollar").

staff, which completed an extensive review of data request responses and presented findings in the record.[29] In fact, the Staff Proposal contains an analysis of the rates charged based on information received by the Communications Division staff from six companies—Securus, Global Tel*Link Corporation, Inmate Calling Solutions, Legacy Inmate Communications, NCIC, and Pay Tel Communications.[30] The Staff Proposal analyzes information submitted by service providers that serve 349 facilities in California to then estimate that the Staff Proposal's proposed changes would impact 186 facilities or over 46,000 incarcerated people.[31] In addition, Cal Advocates submitted for the record its results based on data request responses from some of California's largest IPCS service providers—Global Tel*Link, Securus, ICSolutions, and NCIC.[32] Numerous public-interest advocates also filed proposals with supporting details, as explained below. Accordingly, the interim relief rate of $0.07 per minute (5 cents plus the site commission allowance) is supported by the record based on the Communications Division Staff report presentation, evidence in the record, and proposals in the record that are lower than seven cents per minute.

[29] Public Participation Hearing April 28, 2021 at 12:4-28 (Communications Division, Mr. Serle)(presenting slides of data request responses analysis based on response from six California providers); at 13:2-13 (Communications Division, Mr. Serle)(presenting the staff proposal rate structure).

[30] March 2021 Staff Proposal at 1, Attachment A, Data Request Summary of Information.

[31] March 2021 Staff Proposal at 3.

[32] Cal Advocates Opening Comments to Staff Proposal at 3, 6-7, notes 17, 32, and Figures 1 and 2 (presenting analysis based on data request responses of four of California's largest ICS providers—GTL, Securus Technologies, Inmate Calling Solutions, and Network Communications International Corp.).

2. *The CDCR-GTL contract's rate is informative as a rate entered into by GTL, a major IPCS provider in California.*

Arguments that post-decision developments with the CDCR-GTL contract for incarcerated communication services[33] somehow invalidate the Commission's reference to the rate in the contract are misplaced and do not support rehearing. GTL was able and willing to enter into California's largest contract for incarcerated calling services at a rate of 2.5 cents-per-minute for voice calls. The factual elements of the CDCR-GTL contract are properly considered by the Commission. This specific rate within the contract is an appropriate data point that the Commission reviewed and used, in part, to make its determination.[34] The contract is evidence of GTL's intent, motive, and state of mind when entering into the contract.[35] GTL would not have entered into the CDCR-GTL contract if it did not view a 2.5 cents-per-minute rate as commercially reasonable. Therefore, administrative or contract law arguments about the legality of the request for proposal process for this contract are irrelevant to this proceeding's determination of what constitutes a just and reasonable rate.

Securus' claim that the post-decision legal challenge of the CDCR-GTL contract invalidates the Interim Decision rate caps also misstates the legal standard for rehearing. The court order regarding the Securus challenge to the CDCR request for proposal process was not issued until well after the Commission adopted the Interim Decision. Securus cannot now argue that the Commission's failure to anticipate that court order somehow demonstrates an abuse of discretion or lack of support for its findings on the record. Subsequent events and developments do not

[33] Securus Application for Rehearing at 3. NCIC makes a slightly different argument that the Interim Decision failed to account for a charge in the CDCR-GTL contract when the Interim Decision considered the rate in the contract. *See* NCIC Application for Rehearing at 5. For similar reasons, the rate in the contract is still a rate that one of the state's largest IPCS providers was willing to enter into.

[34] Interim Decision at 51-59.

[35] *See* Cal. Evid. Code § 1250.

demonstrate that Commission's Interim Decision is unlawful under Section 1732 or 1757.[36] If the Commission determines that this legal challenge of the state's procurement process is relevant to ratesetting for IPCS services in any manner, it can address this issue in its consideration of permanent rates.

B. The Applicants' complaints that they had no opportunity to submit cost information in the record are not appropriate

1. Applicants had ample opportunity to submit cost information into the record but repeatedly failed to do so.

Securus argues that IPCS providers had no opportunity to submit cost information in the record.[37] However, on numerous occasions, the Commission provided opportunities for providers to submit relevant information (including cost data), which a reasonably prudent service provider would have acted upon. For example, early on in the proceeding, during the 2020 prehearing conference, Securus shared that it had previously hired an independent, third party to perform a "thorough cost study report," and that this study was filed with the FCC.[38] However, in subsequent filings at the Commission, Securus did not enter the study that it had mentioned during the prehearing conference, into the CPUC proceeding record.

In addition, once the March Staff Proposal suggested an interim per-minute rate, IPCS providers noted their support of the proposal but did not provide their own data to justify this support. In contrast, other parties did provide support for alternate proposals. The March Staff Proposal contained analysis of the rates charged based on information received by the

[36] *See, also*, Commission Rules of Practice and Procedure 16.1 (Applications for Rehearing are intended to "alert the Commission to a legal error" and must be supported by references to the record or law.) The Commisison has other procedural vehicles to address changed circumstances or new facts that could be appropriate if these were not interim rates.

[37] Securus Application at 10-13.

[38] Prehearing Conference December 10, 2020 Transcript at 15:22-27 (Securus, Ms. Acocella).

Communications Division staff from six IPCS companies—Securus, Global Tel*Link Corporation, Inmate Calling Solutions, Legacy Inmate Communications, NCIC, and Pay Tel Communications.[39] The Staff Proposal, informed by IPCS confidential data, identified intrastate per-minute rates as high as $1.75 per minute, with a fifteen-minute call costing $26.25.[40] Even as the Staff Proposal suggested adoption of the FCC's 2021 revised rates, it also provided notice that the Commission would consider even lower rates by remarking that the FCC rates would be unreasonable for the long term and should only be used on an interim basis.[41] In opening comments on the Staff Proposal, Securus asserted that rates "reflect the costs of providing the services and capabilities dictated by the correctional agency's RFP."[42] However, in those same comments, Securus also stated that it welcomed the opportunity to collaborate with the Commission to "conduct a cost study to inform the need for regulatory action,"[43] despite its prior claims, discussed above, that it already had a study conducted by an independent third party.

NCIC similarly referenced potentially relevant information, but never entered it into the record; NCIC previously shared that several ICS providers submitted rates to the FCC for services in jails, and that the FCC compiled this information. NCIC further referenced similar information for "inmates' towns, cities, county jails, prisons that had a variance from the interstate rate to in-state rate," and observed that in most cases, jail phone rates for intrastate calls were "higher and in some cases significantly higher than the out-of-state rates."[44] Moreover,

[39] March 2021 Staff Proposal at 1, and Attachment A, Data Request Summary of Information.

[40] March 2021 Staff Proposal at 1.

[41] March 2021 Staff Proposal at 1-3.

[42] Securus Opening Comments to Staff Proposal at 14.

[43] Securus Opening Comments to Staff Proposal at 14.

[44] Prehearing Conference December 10, 2020 Transcript at 70:26-28 to 71:1-9 (NCIC, Mr. Pope).

GTL states that through its responses to data requests in this proceeding, GTL's rates have decreased over time, and that "majority of intrastate inmate calling service rates" that it serves are "at or below the comparable FCC interstate inmate calling service rate caps."[45] but, as the Interim Decision notes, provision of cost information in discovery data request responses does not enter this information into the record in this proceeding.[46]

Cal Advocates, on the other hand, submitted evidence in the record that justifies the Interim Decision's interim rate. Cal Advocates submitted its analysis of data request responses from some of California's largest IPCS service providers—GTL, Securus, ICSolutions, and NCIC.[47] In fact, Cal Advocates presented a table that showed that the average-per-minute intrastate IPCS calling rate in county and local jails "are an order of magnitude" higher than both state and federal prison IPCS calling rates, and that there was "no clear indication why the average rate in a county jail would need to be 1,124 percent higher than the rate for the same service in a state prison."[48] Therefore, despite IPCS providers' arguments that they did not provide cost information in the record, for reasons that include the inaccurate claim they had no notice—to be discussed below—Cal Advocates submitted evidence of providers' costs into the record.

Securus claims that IPCS providers had no opportunity or notice to submit data, including cost data,[49] but this reflects a less than robust response to the March 2021 Staff Proposal's

[45] Global Tel*Link Opening Comments to Staff Proposal at 7.

[46] Interim Decision at 57.

[47] Cal Advocates Opening Comments to Staff Proposal at 3, 6-7, notes 17, 32, and Figures 1 and 2 (presenting analysis based on data request responses of four of California's largest ICS providers—GTL, Securus Technologies, Inmate Calling Solutions, and Network Communications International Corp.).

[48] Cal Advocates Opening Comments to Staff Proposal at 6-7, and Table 1.

[49] Securus Application at 11-12.

recommended rates, especially in light of aggressive per-minute-rate proposals suggested by other parties.[50] Had IPCS providers sought to actively support the FCC 2013 rates as the Staff Proposal suggested, and urge the Commission to reject other proposals in the record, IPCS providers could have provided evidence in the record to bolster this decision with self-submitted cost information. IPCS providers chose not to do so, and in fact, Securus claims that "there was no conceivable need to submit cost information" in response to the March Staff Proposal.[51] Cal Advocates (5 cents), Worth Rises (11 cents among other proposals), [52] and TURN (30 percent less than FCC 2021 rates)[53] submitted aggressive proposals with rates less than the FCC 2013 rates or even less than the FCC 2021 rates. In addition to these suggestions, parties in reply comments, including CforAT, submitted proposals that called for even lower rates than those submitted in opening comments and the inclusion of some free allotment of minutes for voice calls.[54] IPCS providers did not independently introduce evidence about their own services into the record in this proceeding to bolster their support of the Staff Proposal and the FCC 2013 rate, despite ample opportunity to do so in both opening and reply comments on the Staff Proposal.

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[50] Cal Advocates Opening Comments to Staff Proposal at 9-12 (suggesting a 5 cent per-minute rate); TURN Opening Comments to Staff Proposal at 11-13, 17 (suggesting at least a 30 percent rate reduction from the FCC 2021 rate for interstate calling); PPI Opening Comments to Staff Proposal at 4; TURN Reply Comments to Staff Proposal at 13.

[51] Securus Application at 11-12.

[52] Californians for Jail and Prison Phone Justice Coalition Opening Comments to Staff Proposal at 2, 5-6 (proposing to use the previous FCC analysis on prison and jail intrastate rates as a baseline of 11 cents, and noted that other states like New Jersey have done this).

[53] TURN Opening Comments to Staff Proposal at 11-13, 17. TURN reiterated its proposal again in reply comments. TURN Reply Comments to Staff Proposal at 12.

[54] *See* Californians for Jail and Prison Phone Justice Coalition Reply Comments to Staff Proposal at 3-5 (suggesting several proposals ranging from 0.9 cents to 11 cents per minute and an allotment of two-free 15-minute phone calls per week); CforAT Reply Comments to Staff Proposal at 6-7 (suggesting 5 cents per minute and a minimum allotment of 15 minutes at no charge every month); Cal Advocates Reply Comments to Staff Proposal at 2-3 (suggesting a 5-center per-minute rate and an allotment of two calls of 15 minutes per call at no cost per month).

Moreover, in its reply comments on the Staff Proposal, Securus argued that "absent" cost data, the Commission has no basis to find rates are unreasonable,[55] but elsewhere in its filings, Securus uses non-cost data, such as rates, as a comparison tool. In response to the March Staff Proposal, Securus argued that a rate's reasonableness requires an asseement of underlying costs.[56] Yet, earlier in the proceeding, in defending the lack of market power abuse, Securus felt that rates were appropriate tools, stating that that rates "reflect the costs of providing the services and capabilities dictated by the correctional agency's RFP."[57] To the extent Securus finds evidence of rates a valid comparison tool, it should not now accuse the Commission of failing to gather cost data (a point disputed and discussed here as well) and therefore failing to have a basis to find rates as unreasonable. If Securus relies on rate data to make its arguments, it should not criticize the Commission's use of rate data as an element of the Commission's analysis.

2. Providers had Ample Notice that the Commission was Considering Adopting Rates below the FCC's 2013 Rate.

Despite Securus' argument that at the time of the March Staff Proposal, that there was "no indication" that the Commission was considering alternative rate caps,[58] and that submission of cost data would have been "redundant," IPCS providers had ample notice that the Commission was considering adopting a rate even lower than the FCC 2013 rate.[59] In fact, both

[55] Securus Reply Comments to Staff Proposal at 3.

[56] Securus Reply Comments to Staff Proposal at 3.

[57] Securus Opening Comments to Staff Proposal at 14.

[58] Securus opines that the rate cap is "an alternative rate cap below the IPCS providers' cost to provide services" and argues that at the time of the Staff Proposal, Securus had no indication that the Commission was going to consider such a rate cap. Securus Application at 12.

[59] Staff Proposal at 1-3.

a subset of IPCS[60] and non-IPCS telecom providers[61] agreed with the Staff Proposal's recommendation that the Commission lower intrastate rates once the FCC lowered its rate. Some IPCS providers, such as Pay Tel, disagreed with the Staff Proposal's suggestion to lower the CPUC rates when the FCC lowered its rates.[62] Pay Tel explained that the resources and consultants hired to do a robust data analysis concluded that the latest FCC analysis was wrong.[63] Notably, Pay Tel did not defend its assertions with data submissions in the record in this proceeding but relied only on the vague assertion that it would be arbitrary and capricious for the Commission to rely "as a matter of course on whatever new rates the FCC might set."[64] This feedback suggests that parties had actual notice that lower rates were under consideration. Securus' own rebuttal to the various proposals made by several parties in their opening comments on the Staff Proposal provides further evidence that Securus was on notice that the Commission might consider rates lower than those adopted by the FCC.[65] For example, Securus disagreed with Californians for Jail and Prison Phone Justice Coalition's proposal to adopt the FCC 2015 rate of $0.11 per minute rate for all calls, stating that it was part of a structured approach.[66] Securus also disagreed with Cal Advocate's proposal to adopt an interim rate of

[60] NCIC Opening Comments to Staff Proposal at 4.

[61] Verizon Opening Comments to Staff Proposal at 4.

[62] Pay Tel Opening Comments to Staff Proposal at 6.

[63] Pay Tel Opening Comments to Staff Proposal at 6 (presenting its arguments for the deficiencies in the FCC's methodology, including the lack of FCC's distinction between prisons and jails).

[64] Pay Tel Opening Comments to Staff Proposal at 6 (presenting its arguments for the deficiencies in the FCC's methodology, including the lack of FCC's distinction between prisons and jails).

[65] Securus Reply Comments to Staff Proposal at 9-13.

[66] Securus Reply Comments to Staff Proposal at 9-10.

$0.05 per minute rate taking issue with Cal Advocate's recognition of prior legislative work and the rates achieved in other states.[67]

In addition, providers had notice that some parties were recommending rates lower than FCC rates even after parties filed comments and reply comments on the Staff Proposal. An ex parte notice filed in this proceeding described a meeting between Prison Policy Initiative, TURN, Center for Accessible Technology, Californians for Jail and Prison Phone Justice Coalition, and Cal Advocates, and the Assigned Commissioner's office, during which the attending parties recommended "free calls, lower rate caps, [and] a set allotment of free ICS minutes per month," among other recommendations.[68]

Therefore, throughout this proceeding —prior to the issuance of the Staff Proposal, during the comment cycle on the Staff Proposal, and through an ex parte notice —IPCS providers had notice that the Commission might be considering a rate lower than the FCC 2013 or the FCC 2021 rate, and that IPCS providers should bolster their positions by submitting data in the record.

C. The record contains sufficient evidence of the economies of scale and scope, and the Commission properly relied on this information when determining an interim rate.

Applicants argue that the Commission's decision to set a single rate for all facilities in California is improper, because that decision contradicts Applicants' assertions. Additionally, Applicants appear to take the position that the only credible evidence in this proceeding is the evidence submitted by IPCS providers.[69] However, the Commission's determination that a

[67] Securus Reply Comments to Staff Proposal at 10-11.

[68] Notice of Ex Parte Communications, R.20-10-002 (May 17, 2021).

[69] NCIC Application at 6-7.

uniform interim rate cap is necessary and appropriate does not mean that the Commission failed to review the evidence in the record,[70] nor that the record evidence was insufficient. As discussed above, parties introduced substantial evidence in the record about the differences in rates charged to end users between jails, prisons, and other facilities.[71] For example, Cal Advocates provided extensive analysis on intrastate rates in jails and concluded that close to 40 percent of California jails already charge rates at or below 5 cents per minute for intrastate voice calls.[72] Cal Advocates also reviewed intrastate rates in prisons, and similarly concluded that 5 cents per minute was an appropriate rate, using information from the current CDCR-GTL contract for the state prison system, work on prior multi-stakeholder legislative efforts that proposed a 5-cents-per minute rate for voice calls, and also information on rates charged in ten other states.[73]

Similarly, CforAT concretely described the economies of scale enjoyed by the handful of IPCS providers serving the state with the most incarcerated persons in the country that goes beyond GTL's economies of scale through the CDCR contract. CforAT provided examples from

[70] *See* Interim Decision at 52-55, 58.

[71] Cal Advocates Opening Comments to OIR at 3-4; NCIC Opening Comments to OIR at 3 (referencing to FCC rates); Prison Policy Initiative Opening Comments to OIR at 5-6, and Exhibit 1 and 2 (presenting rate information obtained through service providers' publicly available information for several types of correctional facility systems or single facilities); Root and Rebound Opening Comments to OIR at 8 (presenting differences between jails and juvenile facilities); Pay Tel Opening Comments to Staff Proposal at Exhibit C at 7-15 and its Exhibit A at 1-9; TURN Reply Comments to Staff Proposal at 9, 11; Scoping Memo at 6-9 (recounting differences between the costs for those with short-term stays in county jails).

[72] Cal Advocates Opening Comments to Staff Proposal at 12-13, and Figure 2 (presenting analysis based on data responses from GTL, ICSolutions, NCIC, and Securus).

[73] Cal Advocates Opening Comments to Staff Proposal at 9-12, 14-15, 19-20, and Figure 3 (presenting analysis from data showing that 73 percent of California prison and jail facilities have intrastate voice calling rates at or below the Staff Proposal); Interim Decision at p. 7-8 (discussion of legislative negotiations on IPCS rates).

other states, and noting GTL and Securus' statements in the record that their companies provided "fee call credits" that resulted in "341 million free [sic] minutes of phone collection time."[74]

Notably, Securus makes observations about the reasons for the rate variation among different correctional agencies as part of its comments in the record.[75] But despite the variation in the rates between jails and other facilities, the Commission's record contains information of the pattern seen in locations in California where voice calls are free; in those locations, the call volume increases substantially.[76]

Therefore, Securus's argument that the Interim Decision is not based on evidence[77] of the impact of economies of scope and scale is not persuasive because there is data in the record (obtained from sources other than self-reported IPCS provider figures), substantially justifying the interim relief rate. In fact, the Interim Decision spends a considerable time summarizing information in the record about the variations in rates among facilities, and concludes that it was not following the FCC's approach.[78] Instead, the Interim Decision explains the Commission's rationale and explicitly states that its adoption of the interim rate cap is intended to "account for the cost to serve smaller facilities" despite the failure by providers to introduce concrete cost data

[74] CforAT Reply Comments to Staff Proposal at 7, note 25; Interim Decision at p. 49.

[75] Securus Reply Comments to Staff Proposal at 3-4 (citing to other comments in the record from Cal Advocates and GTL).

[76] Prehearing Conference December 10, 2020 Transcript at 60:3-16 (San Francisco Financial Justice Project, Ms. Lau) (explaining that once San Francisco offered free phone calls, "incarcerated people and their support network can now spend 80 percent more time in communication").

[77] Securus Application at 18-19. Securus recognized that the Commission made adjustments to account for elements such as the cost differences between prisosn and jails, but Securus disagrees with the Commission's approach. Securus Application at 19-21.

[78] *See* Interim Decision at 52-55, 58, 99.

for those smaller facilities.[79] Thus, IPCS provider arguments that the evidence was not considered is not appropriate.

Relatedly, both Applicants make similar arguments about the use of data in the record. NCIC argues that the Interim Decision ignores the economies of scale enjoyed by IPCS providers serving prisons, as opposed to county or local jails.[80] NCIC makes three arguments, beginning with a contention that the Commission "ignored" this "by asserting that the cost of serving jails is not 'more than double the cost of providing call services to the California state prison system.'"[81] Second, NCIC claims that offsets for the rate were not included from the large amount of minutes of use, and from non-voice bundled services in the contract.[82] Finally, NCIC states that as a bundled services contract, the CDCR-GTL rate is "directly tied to its anticipated generation of 12.3 million in gross revenue from the other services to be provided."[83] For its part, Securus argues that there is no evidence to support the use of a single rate for all facilities.[84] It also disagrees with the Commission's adjustments to the rate in order to account for facility size.[85] None of these arguments show a lack of evidence. Rather, the Applicants merely disagree with the Commission's weighting of the evidence when setting the rate for interim relief.

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[79] *See* Interim Decision at 52-55, 58, 99 (for example, the Interim Decision calls out PayTel for not providing specific examples of the cost differential to serve the 68 incarcerated persons in the Siskiyou County Jail.)

[80] NCIC Application at 6.

[81] NCIC Application at 6 (quoting Interim Decision at 52).

[82] NCIC Application at 7.

[83] NCIC Application at 6.

[84] Securus Application at 3-4.

[85] Securus Application at 19.

D. The Providers Fail to Meet Their Burden to Demonstrate a Takings

Despite the Commission's rejection of Securus's takings claim in the Interim Decision, Securus recycles its argument that the Commission's adopted rate cap for intrastate IPCS voice services is "confiscatory" and, if implemented, would result in an unlawful taking pursuant to the Fourteenth Amendment of the U.S. Constitution.[86] In its Interim Decision, the Commission rejects Securus's takings claim, and similar claims made by GTL, finding that, "[t]he burden is on petitioners to show the rate of return (or cost of capital) established by the [Commission] was clearly confiscatory" and that the providers failed to meet their burden to provide a "clear showing" that the adopted rate caps would "threaten the utility's financial integrity."[87]

The Commission has previously addressed the issue of regulatory takings and held that "regulation in the public interest should be imposed absent a clear indication that a 'taking' will occur."[88] The Commission has further declared that regulated telecommunications providers are not entitled, as a matter of right, to realize a particular rate of return or profit and that any claim for compensation for a loss of profit should necessarily fail,"[89] also stating that the mere claim of "the loss of future profits – unaccompanied by any physical property restrictions – provides a slender reed upon which to rest a takings claim."[90] The U.S. Supreme Court also sets a similarly

[86] Securus Application at 25 (citing Cal. Const. art. I, §19).

[87] Interim Decision at p. 94 (citing *Ponderosa Tel. Co. v. Cal. Pub. Util. Comm* .(2019) 36 Cal.App.5th 999, 1019.)

[88] D.95-09-121 (R.95-04-043), 1995 Cal. PUC LEXIS 778.

[89] D.97-04-090, 1997 Cal. PUC LEXIS 363, at 33 ("a regulated entity has neither has a constitutional right to a profit nor a constitutional right against a loss" (quoting *20th Century Ins. V. Garamendi*, 8 Cal. 4th 216, 293 (1994))).

[90] D.97-04-090, 1997 Cal. PUC LEXIS 363 at 34 (quoting *Andrus v. Allard* 444 U.S. 51, 66 (1979)).

high standard for takings claims, finding that a confiscatory rate is not about lost profits and must, instead, "threaten[s] an incumbent's 'financial integrity.'"[91]

The Commission has further distinguished economic or regulatory takings, such as the Interim Decision's adopted rate cap, from physical and land-use takings to find that when the rules at issue are interim and regulations are intended to support the "public interest" and the needs of a narrow, vulnerable group of customers for a specific period of time, a successful claim of a takings must rise to the "functional equivalent of an 'ouster'"[92] and that there is strong burden to demonstrate direct financial harm. Most recently, the Commission rejected carriers' claims that the adopted changes to a long-standing ratesetting formula would result in a taking.[93] The Commission found that the carriers failed to demonstrate that the regulation will "result in net losses."[94] The Commission has also previously considered whether the "net effect" or "end result" of a regulation would be confiscatory[95] and determined that "[w]hether a regulation of rates is reasonable or confiscatory depends ultimately on the result reached."[96]

Securus fails to acknowledge that the Commission had declared that a review of a takings claim must entail the "balancing of the interests of the regulated entity providing the services and

[91] *Verizon Comm., Inc. v. Fed. Comm. Comm'n* 535 U.S. 467, 524 (2003) (quoting *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 and 312 (1989))

[92] D.95-09-121, 1995 Cal. PUC LEXIS 778 and D.97-04-090, 1997 Cal. PUC LEXIS 363 at 39 (reject claims of takings from an interim decision intended to be in place while the Commission considered more permanent rules and designed to address the needs of a narrow group of competitive communications providers)

[93] D.21-08-042 (August 19, 2021, Denying Rehearing of D.21-04-005 (R.11-11-007)) at p. 12.

[94] D.21-08-042 (August 19, 2021, Denying Rehearing of D.21-04-005 (R.11-11-007)) at p. 12.

[95] D.97-04-090, 1997 Cal. PUC LEXIS 363 at p. 33 (citing *Federal Power Com. v. Hope Nat. Gas Co.*)

[96] D.21-08-042 at p. 12 (relying on *Birkenfeld v. City of Berkeley,*17 Cal. 3d 129, 165 (1976)).

the interests of the consumers of such services."[97] In its Interim Decision, the Commission made clear that the adopted rate caps and other economic regulations are necessary in the public interest to address the "undue financial burden on low-income families and communities of color" and the high levels of debt experienced by many families to stay in contact with an incarcerated family member.[98] Securus fails to not only demonstrate how the record supports a showing of "net losses" from the adopted rate caps, but also how its claims of lost future revenue and profits outweigh the public interest in protecting the critical role of affordable voice communications services to incarcerated persons and their families.

At a minimum, the Commission should reject the takings claim raised by Securus as premature. The Commission has found these types of claims to be "premature" where the "claimant has not 'followed reasonable and necessary steps to allow regulatory agencies to exercise its full discretion…[because] until these ordinary processes have been followed[,] the extent of the restriction on property is not known and a regulatory taking has not yet been established.'"[99] Securus and NCIC make a point of impressing upon the Commission that implementation of the Interim Decision will involve complicated and potentially protracted renegotiation of the contracts between the IPCS providers and the applicable local or county facility.[100] It follows, therefore, that the end result of the adopted rate cap on collected revenue

[97] D.97-04-090, 1997 Cal. PUC LEXIS 363 at p. 33 (citing *Federal Power Com. v. Hope Nat. Gas Co.* 320 US 591, 603 (1943); *20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216, 293 (1994)).

[98] Interim Decision at 3, 104, and 106 (Findings 30-32: regular contact with family members during incarceration reduces recidivism rates).

[99] D.21-08-042 at p. 12 (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 620-621 (2001)).

[100] Securus Application at 26-27; NCIC Application at 8-9 (outlining anticipated steps to mitigate revenue loss including changes to facility contracts); GTL Opening Comments on Proposed Decision at p. 2; Securus Opening Comments on the Proposed Decision at p. 14 ("Securus will have to renegotiate all of its California contracts…").

cannot be clear and apparent until these contracts are renegotiated. Given that the record demonstrates the complicated and broad scope of these contracts,[101] the carriers have no basis at this time to justify arguments that the adopted interim rate caps for IPCS voice services are confiscatory.

Joint Consumers urge the Commission to find that until these new rates are in place, and the final terms of the relevant contracts are known, Securus and other IPCS providers have yet to follow the "ordinary processes" and that the "extent of the restriction on property is not known and a regulatory taking has not yet been established."[102] This is especially the case where, as discussed above, Securus has not provided sufficient evidence of its costs that would inform a determination of whether the adopted rates will result in net losses. Moreover, the record includes analysis of the possibility that a reduction in rates charged for voice calling services may increase call volumes and possibly result in increases in overall revenue.[103] Securus has not, and at this time it cannot, perform the complicated calculations to demonstrate a confiscatory taking.

Securus urges the Commission to consider whether a rate is confiscatory by looking at the "total effect" of the regulated rate on the ability of the "company to operate successfully."[104] Yet, Securus fails to discuss the opportunities afforded to these providers to shift the expected revenue generation from IPCS voice services that are the subject of the Interim Decision, to other

[101] Interim Decision at 23, FOF 14 (site commissions contribute to contractually high rates); 36 (provider contracts impose some 35 ancillary fees in connection with IPCS).

[102] D.21-08-042 at p. 12

[103] Prehearing Conference December 10, 2020 Transcript at 60:3-16 (San Francisco Financial Justice Project, Ms. Lau) (explaining that once San Francisco offered free phone calls, "incarcerated people and their support network can now spend 80 percent more time in communication").

[104] Securus Application at 28 (citing *Fed. Power Conm v. Hope Natural Gas Co.,* 320 U.S. 591, 602 (1944)).

services that are not subject to a Commission-imposed rate cap, thus allowing the provider to mitigate the "total effect" of any perceived harm from the Commission's Interim Decision. Indeed, NCIC argues that the rate caps in the Interim Decision may motivate IPCS providers to "encourage incarcerated persons to use non-regulated services"[105] and seems to acknowledge that this revenue shift is a tool that can be used by the IPCS providers to avoid "net losses in revenue." Joint Consumers certainly would not support carrier practices policies designed to intentionally "encourage" a group of captive customers, that are desperate to make connections with their family and legal counsel, to use a specific set of unregulated and often more expensive services merely because it results in continued supracompetitive revenue for the IPCS provider. However, it is undeniable that this revenue-generation tool reflects the complicated and nuanced suite of services offered by these providers and that this ability to shunt customers into other services directly weakens the Securus' takings claims.

Finally, Joint Consumers note that in *Ponderosa v. CPUC*, a case Securus heavily relies upon to support its takings claim, the Court upheld the Commission's rejection of the company's claims at least in part because the evidence presented by the carriers was "largely of a generalized or theoretical nature."[106] As discussed elsewhere in this Response, Securus' evidence presented on the record, and its arguments here in this Application, must also be described as "generalized or theoretical" and cannot support its takings claims. For example, Securus argues that the adopted rate cap falls "well below" the FCC's interim rate caps and suggests that this relative difference between the two regulations supports their claims that the

[105] NCIC Application at 9.

[106] *Ponderosa v. CPUC*, 36 Cal. App. 5th 999, 1018 (2019).

Commission's rate cap is confiscatory.[107] Yet, there mere fact that two regulatory bodies came to different conclusions and developed different rate caps for different services (intra versus interstate calling) certainly cannot be viewed as a valid and compelling evidentiary basis to support a takings claim. Takings claims require a "fact based" analysis that determines the direct impact of the challenged regulation on the specific entity or entities making the claim. They cannot be based on the record created by a different regulatory body or an unsubstantiated claim that the rate cap "does not enable Securus to recover its costs, including a reasonable rate of return"[108] This type of "generalized" and "theoretical" evidence provided by Securus on the record of this proceeding and as part of its Application, does not support its takings claims.

Securus also argued that it is "hard to conceive of a more confiscatory policy" than the Commission adopted rate structure for ancillary service fees that it claims leaves it "without **any** ability to recover their costs."[109] Joint Consumers urge the Commission to find that, in fact, "it is hard to conceive" that this narrowly adopted rate cap and ancillary fee structure on intrastate IPCS voice services would leave all IPCS providers with absolutely no opportunity to recover costs, in particular and as discussed above, with the IPCS providers plans to renegotiate contracts, move customers to unregulated services, and lower customer service.

E. The Commission Complied with the Procedural Requirements of Public Utilities Code Section 728.

Securus argues that the Commission has an "independent, statutory obligation to hold [an evidentiary] hearing before setting (for the first time) rate caps for IPCS or eliminating ancillary

[107] Securus Application at 29.

[108] Securus Application at 30.

[109] Securus Application at 30 (emphasis in original).

service fees."[110] Securus misreads the relevant statute, and its claims that the Commission failed to follow required procedures should be rejected.

First, Securus misstates Section 728[111] to suggest that the statute compels the Commission to determine just, reasonable or sufficient rates "only" after a hearing.[112] To be clear, the statute says no such thing. The statute states that "[w]henever the Commission, after a hearing, finds that the rates… are unjust, unreasonable, [and] discriminatory," the Commission "shall" fix those rates.[113] Moreover, it is important to note that the statute does not specify the type of hearing that must be held in the context of this rate review, nor does it define the term "hearing" within this section. Elsewhere in the section, on an unrelated matter, the Legislature specifies that the Commission must hold a "public hearing," to ensure public participation in its decision-making. But, here, there is no such limiting language. Indeed, the Commission has previously found that neither section 728 nor section 729 "mandates evidentiary hearings" and that "'a hearing' in the context of sections 728 and 729 means an opportunity to heard, but does not necessarily mean an evidentiary hearing."[114]

The Commission has also noted that Pub. Uitl. Code section 1701.1(a) provides the Commission authority and discretion to determine whether a proceeding requires a hearing. The mere fact that the Commission categorizes a proceeding as "ratesetting" pursuant to section 1701.3 does not guarantee that the Commission will hold an evidentiary hearing, but instead

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[110] Securus Application at 32.

[111] All statutory references are to the Califonria Public Utilities Code unless otherwise noted.

[112] Securus Application at 32.

[113] Pub. Util. Code §728.

[114] Decision 13-04-030 (R.11-10-003) 2013 Cal. PUC LEXIS 144, *12 citing (See e.g. Order Granting Limited Rehearing to Modify Decision (D.) 97-11-074 and Denying Rehearing of Modified Decision [D.99- 02-044] (1999) 85 Cal.P.U.C.2d 71, 81, fn. 8; Order Modifying Decision 94-08-022 and Denying Rehearing [D.95-03-043] (1995) 59 Cal.P.U.C.2d 91, 98.

gives it the discretion to determine if a hearing is necessary to satisfy due process and support robust decision-making.[115] Additionally, the statutory language does not explicitly state that the Commission "shall conduct a hearing" or "shall" allow testimony, evidence or cross examination of witnesses. The statute, instead, focuses on the steps the Commission "shall" take to correct the situation once it finds that the challenged rates are unjust. This is exactly what the Commission did here: it created an interim solution to "fix" the unjust and unreasonable rates charged by IPCS providers for voice calling services so that it could mitigate the harm to the incarcerated persons and their families that comes from these rates. This interim step does not reflect the entirety of the Commission's ratesetting process in this proceeding.

Securus does not, and cannot, argue that it was deprived of an effective opportunity to speak, contribute to the record, and to be heard. As this Commission is well aware, Securus had multiple opportunities to provide comments on a range of issues, including multiple opportunities to provide supporting evidence, data, and analysis into the record, and to respond to other parties' comments and proposals. The Commission also provided ample opportunity for Securus and other parties to the proceeding to request evidentiary hearings and to support such a request with citations to Commission precedent and statutory obligations. Securus did not make a request for hearing, arguing here that the Commission should have initiated a hearing on its own initiative.[116]

Joint Consumers further note that the Commission does not rely on Section 728 for its authority to set rate caps as part of its Interim Decision. In a decision that is over 100 pages, the

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[115] Id.

[116] Securus Application at p. XX; Interim Decision at p. 93 (rejecting Securus' arguments that the Commission did not consider sufficient evidence to support its rate caps and noting that Securus had plenty of opportunity to add evidence to the record, including filing a "motion to hold evidentiary hearings" pursuant to Rule 11.1 of the Commission's Rules of Practice and Procedure.)

Commission cites to Section 728 a single time and only in the context of its authority to determine just and reasonable rates.[117] Instead, the Commission points to several other statutory provisions that give the Commission clear authority to set just and reasonable rates and to otherwise regulate rates to protect the "public interest;" its statutory analysis relies on Public Utilities Code sections 451 and 454, which provide clear authority for the Commission to ensure all customers "receive safe and reliable service at just and reasonable rates" and on non-discriminatory terms and conditions.[118] None of these statutes require or make reference to holding a hearing and, in fact section 454 gives the Commission broad discretion to adopt rules for the consideration of proposed rate changes, "with or without a hearing."[119]

Thus, Securus was not entitled to an evidentiary hearing as part of the Commission's processes to set these interim rate caps.

IV. THE INTERIM DECISION'S ANCILLARY-FEE PROVISIONS ARE A VALID EXERCISE OF THE COMMISSION'S POWER, AND ARE SUPPORTED BY THE RECORD

The Interim Decision finds that carriers impose a variety of ancillary fees that are unique to the IPCS sector, and which add to the financial burdens borne by ratepayers.[120] In light of these findings, the Commission concluded that "[u]nregulated intrastate IPCS ancillary fees

[117] Interim Decision at 16.

[118] Interim Decision at 16, 18, 22, and 97 (Conclusions 2 and 4).

[119] Cal. Pub. Util Code §454 (c) The commission may adopt rules it considers reasonable and proper for each class of public utility providing for the nature of the showing required to be made in support of proposed rate changes, the form and manner of the presentation of the showing, with or without a hearing, and the procedure to be followed in the consideration thereof. Rules applicable to common carriers may provide for the publication and filing of any proposed rate change together with a written showing in support thereof, giving notice of the filing and showing in support thereof to the public, granting an opportunity for protests thereto, and to the consideration of, and action on, the showing and any protests filed thereto by the commission, with or without hearing. However, the proposed rate change does not become effective until it has been approved by the commission.

[120] Interim Decision at 107-108 (Findings 36-43 and 46).

contribute to total IPCS charges that are unjust and unreasonable."[121] Given this background, the Interim Decision prohibits ancillary fees other than single-call fees, and caps single-call fees at $6.95.[122] NCIC and Securus both seek rehearing of the Commission's ancillary-fee ruling. Neither Applicant's arguments are persuasive, and we address each in turn.

NCIC argues that the "Commission ignored the successful steps taken by the FCC to reign in ancillary fees," choosing instead to "reject[] the reasoned determination made by the FCC . . . [and rely] only on a comparison to competitive commercial service offerings."[123] This argument misconstrues the nature of the Commission's role in a federalist system. As a California Constitutional agency, the Commission does not have to follow the FCC in lock step; and in any event, the Commission did not ignore the FCC's limitations on ancillary fees. Rather, the Interim Decision specifically considers the FCC's policy and declines to take a similar approach based on the Commission's conclusion that the FCC's rules do not adequately address the financial hardships that ancillary fees create for consumers in California.[124] Nor did the Commission rely solely on a comparison to competitive commercial services—the Interim Decision references numerous correctional systems that have eliminated various ancillary fees, thus showing that IPCS carriers are able to provide service without this revenue source.[125] When the Interim Decision references general commercial practices, it does so in connection with the remark that no carrier provided evidence showing why existing ancillary-fee practices were just

[121] Interim Decision at 112 (Conclusion 22).

[122] *Id.* (Conclusion 23).

[123] NCIC Application at 8.

[124] Interim Decision at 108 (Finding 46).

[125] Interim Decision at 66-67.

and reasonable.[126] NCIC has still not come forward with evidence concerning the ancillary fees, instead stating that it "reasonably anticipates" certain negative consequences to flow from the Interim Decision.[127] Ironically, NCIC initially urged the Commission to take an aggressive stance on the "abuse" of these fees by some providers and suggested that the Commission eliminate fees such as the Single Service Fee and the Paper Bill Fee as burdensome to end users.[128] NCIC now bears the burden of producing evidence to rebut the Commission's determination, and it cannot carry that burden with conjecture alone.[129]

For its part, Securus launches four separate attacks aimed at the ancillary-fee provisions of the Interim Decision: evidence, preemption, jurisdiction, and practicability. First, Securus claims that the Commission's new ancillary-fee rule is arbitrary because "the Commission never requested cost evidence, [and] it certainly cannot make a factual finding that the [per-minute] cap is sufficient to cover the full cost of service without any ancillary fee revenues."[130] Yet when the Commission solicited party comments on whether IPCS rates were just and reasonable, Securus declined to offer any concrete evidence to support its positions.[131] Based on evidence regarding practices in other jurisdictions, the Commission made a reasoned determination that IPCS

[126] Interim Decision at 73.

[127] NCIC Application at 8.

[128] NCIC Opening Comments on OIRat 4 (suggesting that providers "abuse" these fees to inflate nonrecurring rates to end users without regard to usage, "The CPUC should clarify that no transaction fees, surcharges or inflated first minute rates will be allowed, as is currently being done in California and on interstate calls").

[129] *Southern Calif. Edison Co. v. PUC*, 277 Cal.App.4th 172, 129 (2014) (party seeking rehearing bears the burden to establish grounds for setting aside the decision).

[130] Securus Application at 39-40.

[131] Securus Opening Comments on Staff Proposal at 7-12.

carriers can operate without charging ancillary fees. Securus cannot, at this late date, attack the lack of specific evidence when it waived the opportunity to provide evidence on point.[132]

Second, Securus contends that the Commission's authority to regulate ancillary fees is preempted by federal law. Nothing could be further from the truth. As the Commission noted in the Interim Decision, the FCC has encouraged states to impose ancillary fee limitations that may differ from federal law, provided that such limitations do not *exceed* federal caps.[133] Here, the Commission's limits do not exceed federal caps, so there is no preemption. Securus attempts to salvage its argument by arguing that a prohibition on certain fees (i.e., a cap of $0) is different from a rate cap. But this hair-splitting finds no support in the FCC's own ruling. The FCC speaks specifically of conflict preemption, noting that "state laws imposed on inmate calling services providers that do not conflict with [federal statutes] or rules adopted by the [FCC] are permissible."[134] Conflict preemption is well defined in federal law: it is triggered when "it is impossible to comply with both state and federal requirements" or when "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[135] Conflict preemption is particularly disfavored in the context of telecommunications regulation, where Congress has envisioned a dual regulatory scheme where

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[132] *See Pacific Gas & Elec. Co. v. PUC*, 237 Cal.App.4th 812, 839 (2015) ("To accomplish the overturning of a Commission finding for lacking the support of substantial evidence, the challenging party must demonstrate that *based on the evidence before the Commission,* a reasonable person could not reach the same conclusion." (emphasis added)).

[133] *Rates for Interstate Inmate Calling Services*, FCC Dkt. No. 12-375, Third Report & Order, Order on Reconsideration, and Fifth Further Notice of Proposed Rulemaking ¶ 217 (May 24, 2021) ("To the extent that state law allows or requires providers to impose rates or fees lower than those in our rules, that state law or requirement is specifically not preempted by our actions here."). *See also* Decision at 75-76 (quoting and discussing ¶ 217 of the FCC's Third Report & Order).

[134] Third Report & Order ¶ 217.

[135] *MetroPCS Calif. v. Picker*, 970 F.3d 1106, 1117-1118 (9th Cir. 2020).

states have an acknowledged role to play.[136] Here, there is obviously no conflict: a carrier can easily comply with both state and federal law by not charging ancillary fees. Nor does the Interim Decision obstruct federal law, given that the FCC has spoken approvingly of independent policymaking in California and other laboratories of democracy.[137]

Next, Securus argues that ancillary fees are not purely intrastate, and therefore the Commission lacks authority to regulate them.[138] This theory fails as a matter of both federal and California law. Turning first to federal law, the FCC has classified ancillary fees as "jurisdictionally mixed," a doctrine that applies when "it is impossible or impractical to separate the service's intrastate from interstate components."[139] Thus, the operative definition clarifies that ancillary fees have *both* inter- and intrastate components.[140] As far as California law is concerned, the Commission's jurisdiction does not extend to interstate commerce "except insofar as such application is permitted under the Constitution and laws of the United States."[141] Here, the laws of the United States (both the Communications Act and relevant FCC orders) permit and encourage California to exercise jurisdiction over ancillary fees. Accordingly, California law (in tandem with FCC guidance) grants the Commission authority to regulate jurisdictionally-mixed ancillary fees, and the Commission has validly done so in the Interim Decision.

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[136] *Id.* at 1118.

[137] *See* Third Report & Order, ¶ 217, n.683 (listing, with approval, several state proceedings, including California PUC Rulemaking 20-10-002).

[138] Securus Application at 41.

[139] *Rates for Interstate Inmate Calling Services*, FCC Dkt. 12-375, Report & Order on Remand and Fourth Further Notice of Proposed Rulemaking ¶ 31 (Aug. 7, 2020).

[140] This discussion concerns calls involving at least one California party. We do not dispute that the Commission lacks jurisdiction over transactions that have no California nexus.

[141] Calif. Pub. Util. Code § 202.

Finally, Securus contends that the Interim Decision is "ambiguous and unworkable" because the ancillary-fee rule applies to "intrastate and jurisdictionally mixed IPCS."[142] To begin, this argument does not fall under any category that would justify rehearing. To the extent that Securus is suggesting that the relevant provision be changed so that it applies "only to fees billed to an account with a California billing address,"[143] such suggestion should be denied or deferred to Phase II of this proceeding. Telecommunications services involving at least one California party are properly regarded as jurisdictionally mixed, and in light of the issues discussed in the previous paragraph, the ancillary-fee rule's application to intrastate and jurisdictionally-mixed transactions is entirely appropriate.

V. SECURUS FAILS TO DESCRIBE ANY ERROR WITH RESPECT TO THE INTERIM DECISION'S ANALYSIS OF SITE COMMISSIONS

Securus's Application states that the Interim Decision's "limitation on site commission cost recovery is not supported by substantial record evidence and contravenes California's Penal Code."[144] Securus goes on to mischaracterize the record by alleging that the Commission failed to note California's high site-commission rates and claiming that the Interim Decision "concedes" that the Commission lacks evidence to confirm or dispute that the $0.07 rate cap will allow carriers to recover site commission costs.[145] In actuality, the Commission provided a clear and detailed explanation of the site-commission evidence it relied upon, including a finding that site commissions are a significant factor in high IPCS rates.[146] After analyzing the record

[142] Securus Application at 42.

[143] *Id.*

[144] Securus Application at 23.

[145] *Id.* (internal quotation marks and alterations omitted).

[146] Interim Decision at 32-37 and 104 (Findings 14 & 15).

evidence, the Commission allows an added $0.02 per minute charge on top of a $0.05 base rate, in order to "balance[] this Commission's obligation to ensure just and reasonable rates with counties' authority pursuant to Penal Code Section 4025 to collect commission fees."[147] Notably, the language Securus alludes to at page 23 of its Application (concerning insufficient evidence) does *not*, as Securus states, "concede" anything about the Commission's reasoning. Rather, the quoted language comes from the Commission's remark that Securus failed to provide evidence corroborating its conclusory allegations that a $0.07 per-minute rate cap would be confiscatory.[148]

Securus attempts to discredit the Interim Decision by noting that an additional $0.02 per minute additive is not adequate to recover "*all* site commission costs that sheriffs are entitled by statute to recover, including a host of different [non-telecommunications related] welfare programs."[149] This argument lacks merit because sheriffs are not "entitled" to recover anything and Securus cannot plausibly overcome the Commission's accurate conclusion that "California Penal Code Section 4025(d) *authorizes, but does not require*, county sheriff's departments to collect site commissions."[150] Additionally, Securus makes a factual claim about its costs and cost structure that Securus and other IPCS providers failed to properly demonstrate or support on the record. The Interim Decision acknowledges that site commission rates may have to change,[151] and there is absolutely nothing wrong with the Commission making such a determination when it formulates public policy. The Commission's analysis here is exactly

[147] Interim Decision at 55.

[148] Interim Decision at 93-95.

[149] Securus Application at 24.

[150] Interim Decision at 110 (Conclusion 9).

[151] *See* Interim Decision at 55 ("[W] e wish to allow a reasonable transition period or cushion for counties to identify other funding sources for cost centers currently funded through [site-commission revenue]").

correct (and for whatever persuasive value it may provide, the FCC has reached the same conclusion).[152] Once again, Securus's allegations of "error" are nothing more than policy disagreements under a different name. Securus is free to raise these issues in the subsequent phase of this proceeding, but it has not alleged (let alone proven) any basis for rehearing under Rule 16.1.

VI. THE DECISION DOES NOT IMPAIR THE CONTRACTS OF IPCS PROVIDERS

Securus erroneously argues that the Interim Decision violates the state and federal constitutional prohibitions on laws that impair the obligation of contracts.[153] Securus's argument relies on a faulty interpretation of the law regarding impairment of contracts. Additionally, Securus relies on an incorrect definition of what constitutes an "important public purpose."

A. The Commission's Regulation of IPCS Rates was Foreseeable and Therefore Cannot Cause a Substantial Impairment of IPCS Providers' Contracts.

Both California and federal courts use the same test for determining whether a state has violated the constitutional ban on impairment of contracts. Courts inquire : (1) whether there is a contract relating to the law's subject matter, (2) whether the change in the law impairs the contract, and (3) whether the impairment is substantial.[154] In determining whether the impairment is substantial, courts consider whether the relevant industry has been regulated in the

[152] *See* Third Report & Order ¶ 103, n.314 (citing Calif. Penal Code § 4025(d) for the proposition that if state law permits certain correctional facilities to recover site commissions from providers, but does not mandate such payments, such payments are discretionary in nature).

[153] Securus Application at p. 25.

[154] *Energy Reserves Group v. Kansas P. & L. Co*., 459 U.S. 400 (1983); *Valdes v. Cory*, 139 Cal. App. 3d 775, 789-790.

past.[155] If an industry has been regulated in the past, it is less likely that any impairment is substantial: "[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them."[156]

The role of regulation in this analysis was addressed in *Energy Reserves Group v. Kansas P. & L. Co.*, 459 U.S. 400 (1983) (hereafter, ERG). In that case, ERG and other sellers of natural gas entered into contracts at a time when Kansas did not regulate the rates of natural gas. Kansas subsequently passed legislation imposing price caps on natural gas, and those sellers sued, arguing that the price caps violated the ban on impairment of contracts.[157]

In its discussion whether the Kansas law's impairment of the contract was substantial, the Court noted that "[a]t the time of the execution of these contracts, Kansas did not regulate natural gas prices specifically, but its supervision of the industry was extensive and intrusive."[158] The Court further concluded that the state's regulation of prices was foreseeable, and, accordingly, ERG's "reasonable expectations have not been impaired by the Act."[159] Accordingly, the Kansas statute's impairment of the contract was not substantial.[160]

While prior to this proceeding, the Commission did not regulate the rates for IPCS, the Commission has heavily regulated the larger telephone services industry and adopted regulations

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[155] *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 242, n.13 (1978) (citing *Veix v. Sixth Ward Bldg. & Loan Assn.*, 310 U. S. 32, 310 U. S. 38 (1940)).

[156] *Hudson Water Co. v. McCarter*, 209 U. S. 349, 357 (1908).

[157] *ERG*, 459 U.S. at 405-406.

[158] *ERG*, 459 U.S. at 413-414.

[159] *ERG*, 459 U.S. at p. 416.

[160] *ERG*, 459 U.S. at p. 416.

where rates and fees must be kept to a specific level.[161] Accordingly, California's regulation of IPCS rates was foreseeable, especially given the FCC's request that states address the price of IPCS rates.[162]

B. The Interim Decision Does not Violate the Constitutional Prohibition against Impairment of Contracts because the Commission's Regulation of IPCS Rates Serves a Significant and Legitimate Public Purpose.

If the court determines that a contract impairment is substantial, it may still find the state's action to be constitutional if the state has a significant and legitimate public purpose, for example, to remedy a broad and general social or economic problem.163 "The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests."164 One legitimate state interest is the elimination of unforeseen windfall profits.165

In ERG, discussed above, the Supreme Court held that the Kansas statute did not violate the ban on impairment of contracts because it had a legitimate and substantial public purpose. The Court held that "[t]he State reasonably could find that higher gas prices have caused and will cause hardship among those who use gas heat but must exist on limited fixed incomes."[166]

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[161] *See*, e.g., Commission General Orders 28, 52, 69-C, 96-B, 104-A, 107-B, 133-D, 138, 153, 156, 159-A, 168, 169, 171.

[162] Letter from Ajit Pai to Brandon Presley, President, National Association of Regulatory Utility Commissioners (NARUC), July 20, 2020, available at https://docs.fcc.gov/public/attachments/DOC-365619A1.pdf (last accessed Oct. 7, 2021) ("Given the alarming evidence of egregiously high intrastate inmate calling rates and the FCC's lack of jurisdiction here, I am calling on states to exercise their authority and, at long last, address this pressing problem."

[163] *ERG*, 459 U.S. at 411-412.

[164] *Id*. at p. 412.

[165] *Id*., citing *United States Trust Co.*, 431 U.S. 1, 31, n. 30 (1977).

[166] *Id.* at 411.

Accordingly, to the extent that Kansas's statute impaired ERG's contractual interests, the statue rested on, and was prompted by, significant and legitimate state interests.[167] On this basis, the law was allowed to stand. In this proceeding, the Commission has determined that the high costs of calls are causing hardship for incarcerated persons and their families.[168] As Securus acknowledges, "ensuring that IPCS rates are just and reasonable" is an important public purpose.[169] Accordingly, per *ERG*, the Interim Decision does not violate the constitutional ban on impairment of contracts.

VII. CONCLUSION

For the foregoing reasons, The Utility Reform Network, Center for Accessible Technology, and Prison Policy Initiative respectfully request that each of the Applications for Rehearing be denied.

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Respectfully submitted,
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[167] *Id.* at 418.

[168] Interim Decision at 3-4 (Findings of Fact 11-12, 31).

[169] Securus Application at 26.